A

KK LAND SDN BHD & ORS

v.

AKL CONTRUCTION SDN BHD & ORS

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
CHEW SOO HO J
[SUIT NO: K-24-03-2007]
3 DECEMBER 2013

C ***CIVIL PROCEDURE:*** *Contempt of court - Committal proceedings - Application for - Application to set aside leave for order of committal - Leave obtained based on notice of motion which had been disposed of earlier - Whether res judicata - Whether notice of motion a fresh application - Affidavit in support of application - Whether new facts* D *added - Whether in contravention of O. 52 r. 2(2) Rules of the High Court 1980 - Whether abuse of process of court*

CIVIL PROCEDURE: *Res judicata - Abuse of process of court - Committal proceedings - Application to set aside leave for order of* E *committal - Leave obtained based on notice of motion which had been disposed of earlier - Whether res judicata - Attempt to revive notice of motion - Whether abuse of process of court*

The fourth plaintiff ('applicant') filed an application *vide* encl. 66 to set aside the order of court dated 27 February 2013 ('the said F order') obtained by the third defendant ('the respondent') under O. 52 r. 2 of the Rules of the High Court 1980 ('RHC'). The said order granted leave to the respondent to apply for an order of committal against the applicant and two others. The applicant submitted that the respondent had relied on an *ex parte* notice of G motion to obtain the said order when the notice of motion had been disposed of by the High Court on 20 June 2008 with the order of court dated 15 August 2008. An application to set aside the order dated 15 August 2008 was granted and the respondent filed an appeal to the Court of Appeal. Relying on the doctrine of H *res judicata*, it was submitted that since the notice of motion had been disposed of, the said order should not have been granted based on the same notice of motion. It was further contended, *inter alia*, that (i) there was a breach of the wrong rules being used when the respondent ought to have used the Rules of Court I 2012 instead of the RHC when the said order was granted on

27 February 2013; (ii) there was no affidavit verifying the facts stated in the statement to support the notice of motion which rendered the notice of motion fundamentally defective; and (iii) there was an abuse of the process of court and a duplicity of action. The respondent contended that the notice of motion was filed on 19 June 2008 and an endorsement of "OIT" with the signature and date of 20 June 2008 could not be disposed of without it being sealed and issued. The notice of motion was only issued/sealed upon the written request of the respondent's solicitors. As such, with reference to the case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* ('*Badiaddin*'), it was argued that the order made without hearing was void and a breach of natural justice. It was also submitted that the sealed copy of the order of court expressly stated about the affidavit in support and there were two new added facts which showed that the applicant had committed further contempt.

Held (allowing encl. 66):

(1) The respondent was estopped from reopening the notice of motion for relitigation since the notice of motion had been disposed of followed by the application to set aside the order made thereof. A fresh application can be made for any recurrence or continuing act of contempt after the first notice of motion for leave had been disposed of. However, fixing the disposed notice of motion for rehearing once more would amount to *res judicata*. (para 13)

(2) The case of *Badiaddin* involves a right to be heard by the party who may suffer detriment without that right being accorded to him. In the instant *ex parte* notice of motion, the leave of court was granted in favour of the respondent. As such, the issue of the right to be heard did not arise in such circumstances. (para 14)

(3) The respondent who held the view that the earlier order in terms was void, should have conceded to it being set aside in the earlier application but had nevertheless resisted on the ground that such order was valid and regular. Thus, the doctrine of estoppel would arise to preclude the respondent from changing course. As such, the order dated 27 February 2013 could not be maintained in law and ought to be set aside as the said notice of motion could not be litigated twice. (paras 15 & 16)

(4) The notice of motion was being revived and was not a fresh application. There is no saving provision under the Rules of Court 2012 to permit a pending application filed under the Rules of the High Court 1980 to be continued under the said RHC. On the facts, although the notice of motion was filed on 19 June 2008 when the applicable rules was the Rules of the High Court 1980, when it was heard on 27 February 2013, the Rules of Court 2012 had become effective and the RHC was no longer applicable. (para 17)

(5) The affidavit in support or accompanying affidavit is only to verify the facts relied in the statement. No facts can be added, supplemented or cured by any further affidavit (*Tan Sri Dato (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors*; foll). By adding new matters in addition to what was stated in the statement, there was a contravention of O. 52 r. 2(2) of the RHC. Further, there was an abuse of the process of court when the respondent attempted to revive the notice of motion for relitigation in light of the existing first order of court dated 15 August 2008 which had been set aside and was pending appeal. (paras 18 & 19)

Case(s) referred to:

Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors [1986] 2 CLJ 109; [1986] CLJ (Rep) 58 SC ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(dist)***

Folin & Brothers Sdn Bhd v. Wong Boon Sun & Ors And Another Appeal [2010] 4 CLJ 64 CA ***(refd)***

Government of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(foll)***

Legislation referred to:

Rules of Court 2012, O. 32 r. 2(1)
Rules of the High Court 1980, O. 52 r. 2(2)

For the petitioner/applicant - Hamid Ismail; M/s Hamid & Co Advocs
For the respondent - Ting Sing Chuan; M/s Ting Anuar & Co Advocs

Reported by Kumitha Abd Majid

JUDGMENT

Chew Soo Ho J:

Introduction

[1] Enclosure 66 is an application filed by the fourth plaintiff ("the applicant") for an order to set aside the order of court dated 27 February 2013 ("the said order") obtained by the third defendant ("the respondent") under O. 52 r. 2 of the Rules of the High Court 1980 ("RHC 1980") which granted the respondent leave to apply for an order of committal against the applicant and two others.

[2] The grounds in support of this encl. 66 are, *inter alia*, that the said order was improperly obtained and/or obtained in contravention of O. 52 r. 2(2) of the RHC 1980 and also an abuse of the process of court.

The Fourth Plaintiff's/Applicant's Submission

[3] The applicant submitted that the respondent had relied on an *ex parte* notice of motion to obtain the said order when that notice of motion (exh. S-6) had in fact been disposed of by Her Ladyship Yew Jen Kie JC (as she then was) on 20 June 2008 with the order of court dated 15 August 2008 being sealed upon request by the respondent. This has been found as a fact by His Lordship Ravinthran Paramaguru J in his judgment dated 27 December 2012 (exh. S-11) in setting aside that order dated 15 August 2008.

[4] The applicant submitted further that the respondent had on several occasions admitted that the notice of motion exh. S-6 had been disposed of resulting in the sealed order dated 15 August 2008. These admissions were *vide* the respondent's counsel's letter dated 28 March 2009 (exh. S-20) which enclosed a similar copy of undated *ex parte* notice of motion; *vide* the respondent's affidavit sworn on 16 November 2012 to oppose the applicant's earlier application to set aside the order dated 15 August 2008 wherein respondent stated that the court could dispense with the actual hearing of any *ex parte* application by granting an order and there was no irregularity, referring to the said undated *ex parte* notice of motion for which the order dated 15 August 2008 was granted order in term without an actual hearing by Her Ladyship Yew Jen Kie JC (as she then was); and *vide* the written submission by

respondent's counsel in respect of the setting aside proceeding where it was submitted that the *ex parte* order was pursuant to an *ex parte* application referring to the same undated notice of motion filed on 19 June 2008 as there was no other *ex parte* notice of motion filed by the respondent relating to the contempt of court.

[5] Therefore applicant submitted that since that *ex parte* notice of motion had been disposed of, the said order should not have been granted basing on the same notice of motion. In short, applicant is relying on the doctrine of *res judicata* although learned counsel for applicant did not use this term in submission.

[6] Secondly, since the notice of motion relied on by the respondent (exh. S-6) was filed pursuant to RHC 1980 when instead the Rules of Court 2012 is the effective and applicable rules when the said order was granted on 27 February 2013, it was submitted that the RHC 1980 was no longer applicable.

[7] Thirdly, and in the alternative, on the assumption that the RHC 1980 was applicable, it was contended that the respondent had contravened O. 52 r. 2(2) of the RHC 1980 in that there was no affidavit verifying facts stated in the statement being filed in support of the said notice of motion. What was filed was an affidavit which did not refer to or mention about that statement. Without such an affidavit as provided under O. 52 r. 2(2), it was submitted that the notice of motion dated 19 June 2008 was fundamentally defective citing *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 3 MLJ 458 FC (at para. 36); *Folin & Brothers Sdn Bhd v. Wong Boon Sun & Ors And Another Appeal* [2010] 4 CLJ 64; [2009] 5 MLJ 362 CA (at para. 30). Respondent's said affidavit in support of the notice of motion affirmed on 19 June 2008 and his supplementary affidavit affirmed on 25 February 2013 to the affidavit sworn on 19 June 2008 had added two new facts which were not stated in the statement pursuant to O. 52 r. 2(2) ie, that the applicant had committed the act of contempt also by her servants or agents and also negligently. Referring to *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* (*supra*) where the Federal Court held at para. 37 that:

> [37] … The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time …

Applicant submitted that the addition to the facts in the statement is a contravention which is fatal to the respondent's application.

[8] In addition to the said notice of motion exh. S-6, applicant submitted that the respondent had filed another application for order of committal against the applicant and two others *vide* notice of motion dated 29 August 2008 (exh. S-12) ("the pending application") which is still pending. This pending application is allegedly based on the same subject matter as the said notice of motion leading to the said order being granted and same affidavit in support and same statement in the said notice of motion were used in this pending application. Moreover, applicant submitted that the pending application was premised on the order dated 15 August 2008 granting leave to the respondent to apply for an order of committal against the applicant and two others. The order dated 15 August 2008 had been set aside on 27 December 2012 upon applicant's application and an appeal has been filed by the respondent which is still pending hearing. Hence, applicant submitted that it is an abuse of the process of the court and a duplicity of action by the respondent citing *Government of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74.

[9] Thus, applicant submitted that the said order was obtained irregularly and improperly and ought to be set aside *ex debito justitiae*. As a final point, applicant submitted citing again the Federal Court case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* (*supra*) which held, *inter alia*, that "since leave was granted by us on an *ex parte* basis, it is within the inherent power of this court to revoke the same if it is of the view that the original leave was granted under a misapprehension upon new matters being placed before it", that this court can similarly set aside such an *ex parte* order.

The Respondent's Submission

[10] On the issue of the said order having been improperly obtained by the respondent, it was submitted that applicant's contention that order in term had been granted on 20 June 2008 as endorsed on a copy of the *ex parte* notice of motion for leave (exh. S-6) which had disposed of the said notice of motion and hence the said order could not be granted on 27 February 2013, is misconceived. It is contended by respondent that the said notice of motion was filed on 19 June 2008 and the said endorsement of

"OIT" with the signature and the date of 20 June 2008 was just one day after filing and it could not be disposed of without it being sealed and issued: O. 32 r. 2(1) of the Rules of Court 2012. Respondent contended further that applicant's solicitors had *vide* their letter dated 15 July 2008 (exh. U-6) written to court to request for a hearing date; hence, it is preposterous that the said notice of motion could have been disposed of on 20 June 2008. Respondent submitted that the said notice of motion was issued/sealed only upon the written request by the respondent's solicitors *vide* their letter dated 9 January 2013. Although "OIT" is an order, such order, respondent submitted made without hearing is void and for breach of natural justice citing *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 FC.

[11] On the breach of the wrong rules being used that respondent ought to have used the Rules of Court 2012 instead of the RHC 1980, respondent submitted that the said notice of motion was properly filed under the RHC 1980 as it was the applicable law at the material time. Pertaining to the contravention of O. 52 r. 2 of the RHC 1980, particularly on the contention of no affidavit under r. 2(2) thereof, respondent submitted that this contention is baseless on ground that the sealed copy of the order of court expressly stated the "Affidavit in support of Ubin bin Jatin affirmed on 19 June 2008 and 25 February 2013 all filed herein". On the two new added facts, respondent contended that they showed further contempt by the applicant relating to unlawful removal of respondent's caveat for which the applicant knew what was alleged against her and she knowingly acted in defiance of the order for stay of execution citing *Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors* [1986] 2 CLJ 109; [1986] CLJ (Rep) 58; [1986] 2 MLJ 193, *inter alia*. Hence, it was contended that there was no prejudice or injustice by such mere technical irregularities; this procedural objection should be dismissed citing *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* (*supra*) at "Held (1)".

[12] On the applicant's submission of an abuse of the process of the court by the respondent in filing another application for an order of committal besides the said notice of motion (exh. S-6), respondent submitted that the notice of motion dated 29 August 2008 was filed pursuant to the leave order dated 15 August 2008

and is different from the said order dated 27 February 2013. And since the order dated 15 August 2008 had been set aside, the notice of motion dated 29 August 2008 had been rendered ineffectual and there is no issue.

Evaluation And Findings

[13] At the onset, it must be emphasised that all the material facts relating to the order of court dated 15 August 2008 ("the first order") having been granted by Her Ladyship Yew Jen Kie on 20 June 2008 for which an application to set aside had been filed and heard with an order setting aside the first order having been made by His Lordship Ravinthran against which an appeal had been lodged by the respondent with the Court of Appeal and pending hearing, were not disclosed to this court before or at the hearing of the same notice of motion (exh. S-6) for leave to apply for an order of committal. These material facts only surfaced in this application to set aside the leave granted in the said order dated 27 February 2013. The fact that the said *ex parte* notice of motion had been granted order in term by Her Ladyship Yew Jen Kie on 20 June 2008 had been found as a fact in the earlier application to set aside the sealed order dated 15 August 2008 which is still pending appeal at the Court of Appeal. Hence, with the said notice of motion having been disposed of followed by the earlier application to set aside the order made thereof, respondent is certainly estopped for reopening the said notice of motion for relitigation. The doctrine of *res judicata* would not permit the respondent from doing so; see the salutary authority of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 SC. It may be true that an act of contempt can recur or can be continuing. That, however, does not mean that the same notice of motion which had been disposed of could be revived and reopened for relitigation. For any such recurrence or continuing act of contempt after the first notice of motion for leave had been disposed of, a fresh application can undoubtedly be made but fixing the disposed of notice of motion for rehearing once more is *res judicata*.

[14] Respondent attempted to contend in submission herein this application that the "OIT" granted in the first instant which was a day after the said notice of motion had been filed without it being sealed/issued and without a hearing being accorded would render such an order void citing *Badiaddin Mohd Mahidin & Anor*

v. Arab Malaysian Finance Bhd (*supra*). It must be noted that the case of *Badiaddin* involves more of a right to be heard by the party who may suffer detriment without that right to be heard being accorded to him. In the instant *ex parte* notice of motion, the respondent was seeking leave of the court and it was granted in his favour. The issue of the right of being heard does not arise in such circumstances.

[15] Astonishingly, in this application, respondent is arguing that the order granting leave made on 20 June 2008 is void but in the earlier application to set aside that first order dated 15 August 2008 which derived from the same "OIT" made on 20 June 2008, it was affirmed *vide* respondent's affidavit sworn on 16 November 2012 to oppose applicant's earlier application to set aside the first order, that the court could dispense with the actual hearing of any *ex parte* application by granting an order and there was no irregularity which I find to be indeed rightly stated. This conduct of sudden and total twist of the respondent's contention must not be countenanced. If respondent held the view that the earlier "OIT" was void, he should have conceded to it being set aside in the earlier application but had nevertheless resisted on ground that such order was valid and regular which resulted in a hearing with submission and/or arguments leading to the order and judgment of His Lordship Ravinthran which is under appeal. The doctrine of estoppel would arise to preclude the respondent from changing course now as by the respondent's conduct in resisting the earlier application contending that the said "OIT" was valid and regular, it had let the applicant to believe that the void OIT was valid and regular; see *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565 FC. The respondent must be precluded from resiling from or changing his earlier course to now contend to the contrary.

[16] On the aforesaid grounds on this point, I find that the said order dated 27 February 2013 cannot be maintained in law and ought to be set aside as the said notice of motion cannot be litigated twice.

[17] As to the contention of the applicable rules for the said notice of motion, the said notice of motion is being revived and not a fresh application. Although the said notice of motion was filed on 19 June 2008 when the applicable rules was the RHC

1980, when it was heard on 27 February 2013 the Rules of Court 2012 has become effective and RHC 1980 can no longer be the applicable and effective law since there is no saving provision under the Rules of Court 2012 to permit pending application filed under the RHC 1980 to be continued under RHC 1980. On this ground the said order ought to be set aside.

[18] Referring to the submission on the breach of O. 52 r. 2(2) of the RHC 1980, upon the above finding that RHC 1980 is no longer the applicable law, it would be irrelevant to deliberate on this issue. In any event, the Federal Court decision on this point of the affidavit in support or accompanying affidavit which is only to verify the facts relied in the statement that no facts can be added, supplemented or cured by any further affidavit at a later time: *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* (*supra*), is expressed. I do not think the respondent can depart from it by adding new matters in addition to what is stated in the statement in contravention of O. 52 r. 2(2) of the RHC 1980.

[19] On the allegation of abuse of the process of court, I find from the clear facts and the earlier proceedings in this case that it is an undoubted abuse of the process of the court for respondent to attempt to revive the said notice of motion for relitigation in the light of the existing first order of court dated 15 August 2008 granted in respect of the same notice of motion which had been set aside with the appeal filed by the respondent to the Court of Appeal still pending. There is merit that such an abuse must not be countenanced.

Conclusion

[20] Having considered all the evidence and submissions by both parties and for the foregoing reasons, I find that the said order of court dated 27 February 2013 cannot be maintained and ought to be set aside and I shall so order. Enclosure 66 is therefore allowed; order of court dated 27 February 2013 is set aside with costs of RM5,000.